

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ANTONIO BARBEE,)	
)	
Petitioner,)	1:16CV659
)	
v.)	1:11CR156-1
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

This matter is before this court for review of the Order and Recommendation ("Recommendation"), (Doc. 182), filed on July 12, 2022 by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). In the Recommendation, the Magistrate Judge recommends that Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Doc. 123), be granted as to Count Two, that Count Two be vacated (including the 84-month sentence, the five-year period of supervised release, and the \$100.00 special assessment for this count), that any money paid by the Petitioner toward the \$100.00 special assessment for Count Two be returned or credited to him, and that a corrected judgment be entered leaving Count One unchanged unless the assigned judge is not satisfied with the resulting sentence.

The Recommendation and notice were served on the parties on July 12, 2022 in accordance with 28 U.S.C. § 636(b). (Docs. 182, 183.) No objections were filed within the time limits prescribed by Section 636. Therefore, the court need not make a de novo review and the Magistrate Judge's Recommendation is hereby adopted, except rather than an Amended Judgment, this matter will be set for a new sentencing hearing. The court is not persuaded that vacating the sentence imposed as to Count Two results in a sentence as to Count One that is sufficient but not greater than necessary.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation, (Doc. 182), is **ADOPTED**, and the stay in this matter is **LIFTED**. **IT IS FURTHER ORDERED** that Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Doc. 123), is **GRANTED**, that Count Two is **VACATED**, and that this matter shall be set for resentencing. The Probation Officer is directed to prepare a Supplement to the Presentence Investigation Report in advance of the hearing. Petitioner remains in custody, and the United States Attorney is directed to produce Petitioner for the resentencing hearing. Counsel will be appointed to represent Petitioner at the resentencing hearing.

IT IS FURTHER ORDERED that the Government's Motion to Dismiss, (Doc. 129), is **DENIED** as moot.

A Judgment dismissing this action will be entered contemporaneously with this Order.

This the 27th day of September, 2022.

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William L. Ostan, Jr.
United States District Judge